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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MICHAEL LAWLER, Plaintiff and Respondent, v. JOHN KEVIN CASEY, et al., Defendants and Appellants.	A132620 (San Mateo County Super. Ct. No. CIV-499881)

A partnership to run a bed and breakfast in Nicaragua soured. Amidst ongoing legal jockeying in Nicaragua, one partner, Michael Lawler, has sued his partners, John and Patricia Casey, and their former corporation, Montecito Designs, Inc. (collectively Casey) in California. Lawler alleges fraud surrounding an oral partnership agreement the parties allegedly entered into in San Mateo, California. Casey petitioned to compel arbitration of Lawler's claims based on an arbitration clause in a written partnership agreement signed by the parties in Nicaragua. The trial court denied arbitration because the arbitration clause appointed a biased arbitrator—namely, Casey's lawyer. While we agree the named arbitrator cannot serve as such, we nevertheless reverse and remand because the trial court should have severed the biased appointment from the remainder of the arbitration clause, instead of voiding the clause in its entirety.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to Lawler, on January 15, 2006, while in San Mateo, California, John Casey "represented" to Lawler "he would enter into a joint venture and partnership with [Lawler] to purchase and develop real property into income producing properties in San

Juan del Sur, Nicaragua, wherein [Lawler and Casey] would contribute equal amounts of capital for acquisition and improvement of real properties in Nicaragua and share equally in the income and profits." Lawler further claims the parties, in fact, entered an oral partnership agreement in San Mateo on January 21, 2006. He also claims Casey told him they would need to form an entity in Nicaragua, a "Societe Anonima," to carry out the partnership's business.

Whether Casey disputes that these oral representations and agreements were made is unclear from the record. It is undisputed, however, that on March 13, 2006, Casey and Lawler were in Rivas, Nicaragua and signed a written contract, which, while cryptically titled "Legal Document Number thirty eight (38) De Facto Corporation", is essentially a partnership agreement. It states there will be a company called "Casey & Lawle [*sic*] S.A." that will operate a bed and breakfast in Port of San Juan del Sur, Nicaragua and other ventures. The company is to have the authority to do all things necessary and convenient to carry out its purpose. Further, "[t]he company shall have a term of duration of THREE years," which would be automatically extended "unless the partners request its dissolution and subsequent liquidation no less that [*sic*] six months before the date the term is set to expire." The contract states what percentage of each business the partners will own and what contributions to the company, financially and operationally, each is expected to make.

The contract contains a "CLAUSE FIVE ON ARBITRATION," which states: "In the case of a disagreement of any kind between the partners, they shall submit to Arbitration under a Fair and Impartial Arbitrator that is herewith appointed to [*sic*] Mr. Carlos Luis Fuertes Gonzales, the undersigned Notary Public. The Parties shall be bound by law to abide by the Arbitrator's determination."

Less than two years after signing their written contract, in 2008, the Casey and Lawler collaboration began to unravel as each contested the other's rights in certain real property. Casey demanded arbitration of the partners' dispute. Lawler refused, and instead, the parties have fought in and out of Nicaraguan courts to create and remove

liens on the contested real property. Gonzales, supposedly the parties' neutral arbitrator, assisted Casey in some of these disputes.

In October 2010, Lawler turned the parties' legal woes into a multi-national affair, filing suit against Casey in superior court in San Mateo, California. Lawler's first amended complaint, filed February 23, 2011, asserts: (1) a common count for an unspecified debt owed Lawler; (2) fraud by misrepresentation, concealment, and false promises related to the alleged oral partnership; (3) a RICO violation based on use of the mail and bank wires to perpetuate the alleged fraud and based on alleged misuse of the Nicaraguan judicial system; (4) false imprisonment of Lawler, apparently in his Nicaraguan home; (5) conversion of unspecified money; (6) accounting for money due Lawler under the oral partnership agreement; and (7) breach of fiduciary duty for failing to make an accounting as requested in July 2008.

Based on the arbitration clause in the written contract, Casey, on March 24, 2011, filed a verified petition to compel arbitration under Code of Civil Procedure section 1281.2[1] and related statutes. Lawler opposed the petition, asserting the named arbitrator, Gonzales, was biased; the written contract had expired; the written contract was invalid under Nicaraguan law because it, among other things, concerned an impermissible form of business entity and did not identify an interpreter; and Casey had waived arbitration based on a claimed delay in filing a petition for arbitration in this case and for allowing various proceedings in Nicaragua without seeking arbitration.

The parties presented several written declarations in support of their respective positions. As to Gonzales' neutrality, however, Casey conceded Gonzales was in fact no longer neutral, but asked the trial court to sever Gonzales' appointment from the arbitration clause rather than invalidate the clause entirely.

The trial court focused on Gonzales' lack of neutrality. At a brief hearing on June 10, 2011, the trial court stated it thought it had "discretion to toss the whole arbitration agreement." And the trial court did so in a two-line order issued on June 28, 2010,

[1] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

stating: "Arbitration must meet certain minimum requirements including the neutrality of the arbitrator. [Citations.] The instant arbitration agreement does not meet this minimum requirement." The court did not address the parties' other contentions, did not expressly find any facts, and did not explain why it chose to exercise its discretion to void the whole arbitration clause in its entirety. Neither party requested a statement of decision.

Casey filed a timely notice of appeal from the order denying the arbitration petition on July 13, 2011.

II. DISCUSSION

Standard of Review

"In reviewing an order denying a motion to compel arbitration, we review the trial court's factual determinations under the substantial evidence standard, and we review issues of law de novo." (*Duick v. Toyota Motor Sales, U.S.A., Inc.* (2011) 198 Cal.App.4th 1316, 1320.) In some circumstances, the trial court has discretion to compel or deny arbitration. In such cases, we review the court's discretionary decision for abuse of discretion. (See *Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 484 [section 1281.2, subdivision (c), states court "may" choose one of several options when party to arbitration agreement is also in a related court proceeding with a third party]; *Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 101 [same]; cf. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 121-122 (*Armendariz*) [a court has limited discretion, depending on the circumstances, to reform or void an arbitration clause with unconscionable terms].)

Choice of Law

Although the parties signed the written contract in Nicaragua for the purpose of carrying out business in Nicaragua, we will apply California law to the arbitration issue before us unless otherwise noted. Both Casey and Lawler have, with limited exceptions discussed below, cited to only California law, both here and in the trial court. Neither party contends the questions of arbitrability or severance should be decided under Nicaraguan law. The trial court applied California law without objection. Under these

circumstances, we deem any choice of law issue waived. (See *Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 632-633 [deeming issue waived and applying California law even when contract required application of Texas law].)

Severability

On appeal, Casey does not defend the contractual term appointing his lawyer, Gonzales, arbitrator. Rather, Casey asserts the trial court abused its discretion by striking the entire arbitration clause rather than severing that single, offensive term.

Civil Code section 1670.5, subdivision (a), pertaining to contracts generally, "provides that '[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.' Comment 2 of the Legislative Committee comment on section 1670.5, incorporating the comments from the Uniform Commercial Code, states: 'Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.' (Legis. Com. com., 9 West's Ann. Civ. Code (1985 ed.) foll. § 1670.5, p. 494 (Legislative Committee comment).)" (*Armendariz*, *supra*, 24 Cal.4th at pp. 121-122.)

"Thus, the statute appears to give a trial court some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement. But it also appears to contemplate the latter course only when an agreement is 'permeated' by unconscionability." (*Armendariz, supra*, 24 Cal.4th at p. 122.) Put another way: "If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Id.* at

p. 124.) Severance is appropriate to further the "interests of justice" by "conserving" lawful contractual relations and by avoiding undeserved benefits or detriments that would flow from voiding an entire agreement, particularly if the agreement has been partially performed. (*Id.* at pp. 123-124.)

Although *Armendariz* notes a trial court has some discretion in selecting a remedy for the presence of unconscionable terms, it also notes this discretion is not unfettered. "Whether a contract is severable in this regard"—that is, whether it is permeated by unconscionability—"is primarily a question of contract interpretation . . . subject to de novo review unless the interpretation turns on the credibility of extrinsic evidence." (*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 178, citing *Armendariz, supra*, 24 Cal.4th at p. 122; cf. *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 149 ["The court has discretion under this statute to refuse to enforce an entire agreement if the agreement is 'permeated' by unconscionability."].)

In *Armendariz*, the Supreme Court affirmed the trial court's decision to strike an entire "adhesive" arbitration agreement between an employer and employee because the agreement contained more than one unconscionable term, indicating a "systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." (*Armendariz*, *supra*, 24 Cal.4th at pp. 114-115, 124.) Further, the arbitration agreement was so one-sided—that is, it required the employee to arbitrate, but not the employer—there was "no single provision" to strike and reformation would impermissibly require augmentation of the contract with additional terms. (*Id.* at pp. 124-125.)

Significantly, *Armendariz* distinguished *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 831 (*Scissor-Tail*). In *Scissor-Tail*, the Supreme Court held "a contractual provision designating the union of one of the parties to the contract as the arbitrator of all disputes arising thereunder . . . does not achieve the 'minimum levels of integrity' which we must demand of a contractually structured substitute for judicial proceedings." (*Id.* at p. 828.) Nonetheless, the court did "not believe that the parties herein should for this reason be precluded from availing themselves of nonjudicial means of settling their

differences." (*Id.* at p. 831.) It continued: "The parties have indeed agreed to arbitrate, but in so doing they have named as sole and exclusive arbitrator an entity which we cannot permit to serve in that broad capacity. In these circumstances we do not believe that the parties should now be precluded from attempting to agree on an arbitrator who is not subject to the disabilities we have discussed. We therefore conclude that upon remand the trial court should afford the parties a reasonable opportunity to agree on a suitable arbitrator and, failing such agreement, the court should on petition of either party appoint the arbitrator. (See and cf. § 1281.6.)" (*Ibid.*)

Scissor-Tail's outcome, according to *Armendariz*, depended in part on section 1281.6. (*Armendariz, supra*, 24 Cal.4th at p. 126.) Section 1281.6 states, pertinent part:

> "If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator." (§ 1281.6.)

Armendariz then noted "[o]ther cases, both before and after *Scissor-Tail*, have also held that the part of an arbitration clause providing for a less-than-neutral arbitration forum is severable from the rest of the clause. (See *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1986) 183 Cal.App.3d 1097, 1107 . . . ; *Richards v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1976) 64 Cal.App.3d 899, 906 . . . .) [¶] Thus, in *Scissor-Tail* and the other cases cited above, the arbitration statute itself gave the court the power to reform an arbitration agreement with respect to the method of selecting arbitrators." (*Armendariz, supra*, 24 Cal.4th at p. 126.)[2]

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[2] Although the parties have not mentioned the case, we take note of *Alan v. Superior Court* (2003) 111 Cal.App.4th 217, 227-228. While acknowledging "if the obstacle to arbitration can be resolved by the appointment of an arbitrator, a court may . . . make such an appointment and compel the parties to arbitrate," it held " '[i]f an arbitration agreement designates an exclusive arbitral forum (e.g., the NYSE), and arbitration in that forum is not possible, courts may not compel arbitration in an alternate

The trial court appears to have understood it had some discretion to sever the provision naming Gonzales arbitrator or to void the entire arbitration clause. However, there is nothing in the record indicating the court actually exercised its discretion within the bounds of *Armendariz* and *Scissor-Tail*. The court made no findings and provided no statement of reasons on the question of severance versus invalidation. This, alone, would require reversal. (See *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 391-392 [failure to exercise discretion at all is an abuse of discretion]; *Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 176-177 [failure to exercise discretion in accordance with governing legal principles is error].)

Moreover, applying our independent judgment on this question of law—is the arbitration clause "permeated" by unconscionability—we conclude, based on the record before us, the clause is not so laden and therefore the appointment provision should have been severed, and the clause not voided in its entirety. Like *Scissor-Tail*, and unlike *Armendariz*, the clause's only relevant defect is naming a now-biased individual as arbitrator. Otherwise, it simply calls for neutral arbitration.

Lawler nonetheless contends the clause is also defective, and thus permeated with unconscionability, because it omits provisions for adequate discovery and limited judicial review, and, more generally, fails to specify the rules that will apply to arbitration. These might well be shortcomings in an arbitration provision clause in an adhesive contract to arbitrate a remedial statutory claim, as "parties agreeing to arbitrate statutory claims must be deemed to 'consent to abide by the substantive and remedial provisions of the statute' " at issue. (*Armendariz*, *supra*, 24 Cal.4th at p. 101 [requiring judicial review and discovery in arbitrations of California Fair Employment and Housing Act (FEHA) (Gov.

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forum by appointing substitute arbitrators . . . .' " (*Id.* at pp. 227-229.) *Alan* does not mention *Scissor-Tail*. It does, however, limit its holding to cases in which choice of an arbitral forum, and particularly its rules, are an "integral part" of the arbitration agreement. (See *Alan*, at pp. 228-229.) Here, in contrast, the arbitration clause is silent as to the procedural rules that will apply and any expectation that a certain set of rules would apply would be unreasonable. Accordingly, this case is akin to *Scissor-Tail*, which deals squarely with arbitral bias.

Code, § 12900 et seq.) claims to give full effect to that statute].) But the absence of such terms, even in that type of arbitration clause, does not render it permeated with unconscionability. Rather, such terms are, as required, "implied as a matter of law" and their absence, even in *Armendariz*, "provide[s] no basis to deny the enforcement of the arbitration agreement." (*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 176-177 [noting it was only the clause's unilateral nature and the unlawful damages provision that contributed to the "permeation" analysis in *Armendariz*].)

Further, the arbitration clause here is not part of a contract of adhesion, and Lawler has not invoked any remedial statute entitling him to special procedural mechanisms.[3] In

[3] This, among numerous other reasons, is why the cases cited by Lawler at oral argument do not further his position. *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 839, for example, held California's hate crime laws (Civ. Code, §§ 51.7, 52.1), like the FEHA at issue in *Armendariz*, created "unwaivable statutory rights." It further held those laws, which only authorized costs and fees to a prevailing plaintiff, did not provide for the recovery of costs and fees in an arbitration proceeding, despite a contrary agreement between the parties—"[o]therwise, the filing of hate crimes claims would be deterred." (*D.C. v. Harvard-Westlake School*, at p. 839.) The court actually found the arbitration clause at issue otherwise enforceable and rejected an unconscionability argument. (*Id.* at pp. 868-869.) *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071, 1074-1076, a wrongful termination case, found unconscionable a one-sided appeal provision in an adhesive employment arbitration agreement. Nevertheless, it concluded the provision was severable because it was the clause's only defect. (*Ibid.*) Not only do these cases concern adhesive contracts and rights conferred by remedial statutory schemes—absent here—they did not even invalidate the arbitration clauses at issue. Finally, *Samaniego v. Empire Today LLC* (2012) 205 Cal.App.4th 1138, 1141-1142, though it found an arbitration clause unconscionable, concerned a contract of adhesion in the employment context which contractors were forced to sign without having opportunity to review and which contained several one sided provisions. This, in contrast, is not an employment or a consumer case, the parties negotiated the business agreement at arm's length, and there is but a single "one-sided" provision which can be readily severed.

There also is no merit to Lawler's assertion, made for the first time at oral argument, that by pleading a RICO claim, he falls within the "unwaivable statutory rights" principle. He offered no authority that the RICO statute creates such rights, and we have found none. Nor did he articulate what those rights would be and how they

fact, Lawler has cited no authority, and we have found none, allowing a court to void a freely-negotiated, arm's length arbitration agreement simply because it lacks a level of specificity about procedures. (Cf. *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 689 ["We are not aware of any case that has ever held that an arbitration provision is substantially unconscionable merely because a party's discovery rights are limited in arbitration. Limited discovery rights are the hallmark of arbitration."]; *American Home Assurance Co. v. Benowitz* (1991) 234 Cal.App.3d 192, 199, 201 [confronted with a "skeletal" arbitration agreement parroting a statutory requirement for arbitration before a "single neutral arbitrator," the court enforced the agreement by reference to the arbitrator selection provision in section 1281.6].)

Lawler also asserts severance would not be in the interests of justice because it would presumably result in a Nicaragua-based arbitration. Even assuming this issue relates to whether the agreement is permeated with unconscionability, the parties *agreed* to a Nicaraguan arbitrator, Gonzales, in the first place, and we fail to see how appointing a second Nicaraguan arbitrator would, in these circumstances, stifle the interests of justice.

Lawler further asserts Casey "had the burden of producing evidence to establish" the "rationale for severance," namely evidence of an undeserved benefit or detriment if the entire arbitration clause were voided, and evidence of Casey's own performance under the agreement. Although *Armendariz* states avoidance of undeserved benefit or detriment is one *rationale* for severance (*Armendariz, supra,* 24 Cal.4th at pp. 123-124 [severance may "prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement—particularly when there has been full or partial performance"]), the case does not make it a necessary *prerequisite* for severance and places no evidentiary burden on the party favoring severance. *Armendariz* instead goes on to re-emphasize the key question we have already answered—the extent an agreement is tainted or permeated with unconscionability. (*Id.* at p. 124.) In any case,

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would influence arbitration procedures. Finally, he failed to connect any purported unwaivable right to the unconscionability analysis.

if the arbitration clause here were voided, the parties' expectation of arbitration would frustrated, which from at least Casey's perspective would be a detriment. (See *Scissor-Tail, supra*, 28 Cal.3d at p. 831 ["The parties have indeed agreed to arbitrate. . . . In these circumstances we do not believe that the parties should now be precluded from" arbitration entirely.].) Severance best fits the parties' contractual intentions.

On remand, if the trial court does not deny arbitration on other grounds, which we address in the next section, it must sever the portion of the parties' arbitration clause appointing Gonzales as arbitrator and follow the *Scissor-Tail* procedure: "upon remand the trial court should afford the parties a reasonable opportunity to agree on a suitable arbitrator and, failing such agreement, the court should on petition of either party appoint the arbitrator. (See and cf. Code Civ. Proc., § 1281.6.)" (*Scissor-Tail, supra*, 28 Cal.3d at p. 831.) If the court appoints a substitute arbitrator, the court should select one similar to the originally-appointed arbitrator to best give effect to the parties' original intent in agreeing to arbitrate. (Civ. Code, §§ 3399 [revision must "express the intention of the parties"]; 3401 ["In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences . . . ."].)

Other Challenges to the Written Contract

Lawler contends the trial court's denial of arbitration can be affirmed on two other grounds. He asserts the parties' written contract is wholly illegal under Nicaraguan law because (a) it did not meet formalities for contracts between parties that do not speak Nicaragua's official language and (b) it concerns a type of business entity Nicaragua does not permit.[4] (See *Duffens v. Valenti* (2008) 161 Cal.App.4th 434, 454, italics omitted

[4] This latter point is somewhat mystifying. Lawler contends the written contract purported to create a "Sociedad de Hecho" or "De Facto Corporation" which he claims Nicaraguan law does not recognize. While "Sociedad de Hecho" is in the contract's title, the contract contemplates the creation of an "S.A.," a Societe Anonima, which Lawler concedes is a lawful entity. It is not at all clear from any of the materials before us why an agreement mislabeled as a "Sociedad de Hecho" would be entirely void simply

[“ ‘Contracts contrary to express statutes or to the policy of express statutes are illegal’ ” and “ ‘[s]uch illegality voids the entire contract, including the arbitration clause.’ ”].) Lawler also asserts Casey waived arbitration based on a claimed five-month delay in filing a petition for arbitration in this case and for allowing legal proceedings in Nicaragua between the parties without seeking arbitration.

The trial court did not reach either issue, and we decline to in the first instance since Lawler’s illegality and waiver arguments raise questions of fact.

“Ordinarily, when the trial court gives an incorrect legal reason for its ruling, we look for any correct legal basis on which to sustain the judgment.” (*Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, 944.) “ ‘[W]here . . . a respondent argues [an alternate ground] for affirmance based on substantial evidence, the record must show the court *actually performed* the factfinding function. Where the record demonstrates the trial judge did not weigh the evidence, the presumption of correctness is overcome. [Citation.] . . . “The [substantial evidence] rule thus operates only where it can be presumed that the court has performed its function of weighing the evidence. If analysis of the record suggests the contrary, the rule should not be invoked.” ’ ” (*Id*. at pp. 944-945; see also *International Aerial Tramway Corp. v. Konrad Doppelmayr & Sohn* (1969) 70 Cal.2d 400, 406, fn. 6 [“ ‘Where the record reflects that the trier of fact has not considered a theory under which the evidence is conflicting, the reviewing court cannot rely on that theory to sustain the action of the lower court.’ ”].)

To address Lawler’s illegality argument we would need to apply Nicaraguan law.[5] In general, “[d]etermination of . . . the law of a foreign nation . . . is a question of law to be determined in the manner provided in Division 4 (commencing with Section 450)” concerning judicial notice. (Evid. Code, § 310, subd. (b).) Here, however, the parties have submitted conflicting declarations about the interpretation of Nicaraguan law.

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because that type of business entity is not among a list of recognized business entities provided by Lawler’s Nicaraguan attorney.

[5] On this one issue—the issue of illegality—both Lawler and Casey agree Nicaraguan law, not California law, applies.

Lawler provided a declaration from a Nicaraguan attorney purportedly attaching portions of Nicaraguan statutory law, from which Lawler argues the parties' contract should be voided. Casey responded with an affidavit from another Nicaraguan attorney stating the first lawyer's interpretation of the law was wrong. In this case, where the interpretation and application of the law, not merely its existence, is at issue, the court faces a question of fact we would review for substantial evidence. (See *Estate of Arbulich* (1953) 41 Cal.2d 86, 99 ["the question of how such statutes . . . have been interpreted and applied by a foreign country is a question of fact"]; *Logan v. Forster* (1952) 114 Cal.App.2d 587, 595-596 ["Where the meaning of the statutory law of a foreign country is in controversy and its elucidation requires expert testimony, the resolution of such conflict as to the meaning and effect of the foreign law remains a question to be determined by the trier of the facts [citation] and such determination, if supported by substantial evidence, will not be disturbed on appeal."]; cf. *Societe Civile Succession Richard Guino v. Redstar Corp.* (2007) 153 Cal.App.4th 697, 701 ["There is no conflicting extrinsic evidence concerning the meaning of the French judgment. It follows that the interpretation of the French judgment is a question of law."].)

Waiver of an arbitration agreement is also a question "of fact, and an appellate court's function is to review a trial court's findings regarding waiver to determine whether these are supported by substantial evidence." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 983-984.)

Accordingly, we do not reach Lawler's illegality and waiver defenses to enforcement of the arbitration provision, and leave them for the trial court to address on remand.

III. DISPOSITION

The order denying Casey's petition to compel arbitration is reversed. On remand, the trial court must consider and rule on Lawler's other defenses to the enforcement of the arbitration provision. If the court rejects these defenses, it must then sever that part of the arbitration provision appointing Gonzales arbitrator and follow the procedure in *Scissor-Tail* for appointing a substitute arbitrator.

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Banke, J.

We concur:

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Marchiano, P. J.

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Dondero, J.